NOT FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

DOREEN FEDEE, Plaintiff, v. **CASTLE ACQUISITION, INC. formerly ELYSIAN, INC., UNITED STEEL WORKERS OF AMERICA-AFL-CIO CLC, local UNION 8249 and WINIFRED DEL SOL,** Defendants.	Civ. No. 2003-156

ATTORNEYS:

Pedro K. Williams, Esq.,
St. Thomas, U.S.V.I.,
For the plaintiff,

Simone R.D. Francis, Esq.,
St. Thomas, U.S.V.I.
For the defendant.

MEMORANDUM

Defendant Castle Acquisitions, Inc. moves to dismiss all of the plaintiff's claims under Rule 12(b). After considering the parties' oral arguments and written motions, I will grant defendant's motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

Fedee was employed by the Elysian Beach Resort, now Castle Acquisitions, Inc. ["Castle"], as a housekeeper from 1991 to 2002. Fedee was a member of Local 8249 of the United States Steelworkers of America, AFL-CIO CLC [the "union"] during her employment with Castle. Castle and the Union had entered into a collective bargaining agreement ["CBA"] regarding Fedee's employment that became effective on April 13, 2001.

On May 13, 2002, Fedee had an altercation with another employee named Winifred Del Sol. On May 15, Castle terminated Fedee's employment for allegedly assaulting Del Sol. (Def.'s Sur-reply, Ex. 1.)

Under the CBA, Castle retained the right to discharge an employee for "just cause." (Exh. A., Art. XIV, § 1.) An employee with a grievance must advise the employer within five working days. (*Id.* at § 2.) If the employer's actions do not satisfy the employee, the union must submit a written grievance within ten working days and the employer, in turn, will have ten days to respond. (*Id.* at § 3.) If the two sides cannot reach an agreement, the matter may be referred to arbitration. (*Id.*) If the union decides to arbitrate, it must notify the employer within ten working days of the employer's "final answer" to the grievance. (*Id.* at § 5.)

Fedee filed a complaint with the union against Castle. On May 18, 2002, the union filed a grievance with Castle denying Fedee's liability for the altercation and requesting that she be re-instated. (Merchant Aff. ¶ 4.) On May 27, 2002, Castle denied the union's request. (Def.'s Sur-Reply, Ex. 2.) On July 18, 2002, Castle and the union representatives attempted to mediate the grievance.[1] (Def.'s Sur-Reply, Ex. 3; Merchant Aff. ¶ 5.) On July 22, 2002, Castle again denied the union's request that Fedee be reinstated. (Def.'s Sur-Reply, Ex. 3.)

Some unknown time afterwards, Fedee retained counsel in this matter, who, on March 20, 2003, wrote a letter to the union inquiring about the status of the grievance. (Pl.'s Opp. to Mot. Dismiss, Ex. A.) Fedee contends that the union never responded, and on August 27, 2003, Fedee sued Castle, the union, and Del Sol in the Territorial Court. Fedee sought recovery against Castle for: wrongful discharge under 24 V.I. Code. Ann. tit. § 76 in Count I as well as breach of "contract employment" and "union contract" for termination without "just cause or due process" in Counts II and III. Count IV alleges that the union failed to properly represent Fedee in her grievance against Castle. Count V alleges that Del Sol assaulted Fedee. Count V also alleges

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[1] Fedee claims that "several months after my termination, a meeting was held with the Union and Castle." (Fedee Aff. ¶ 7.)

that Castle "condoned" the assault by failing to take any disciplinary action against Del Sol.

On October 1, 2003, Castle removed the case to this Court on the ground that it has original jurisdiction over such "hybrid" claims against a union and an employer. Castle then moved to dismiss all Fedee's claims arguing that: (1) the territorial claims as preempted by Section 301 of the Labor Management Relations Act ["LMRA"], (2) federal labor law claims are barred by the statute of limitations, and (3) Count V fails to state a claim under Rule 12(b)(6). Fedee has opposed the motion, arguing that the statute of limitations should not bar this action because the record does not sufficiently show when this time period expired. She also asserts that, even if the statute of limitations has run, she should be allowed to proceed on equitable grounds.

Fedee sought leave of this Court to file an affidavit containing additional factual allegations in support of her opposition. The magistrate judge granted this request and allowed Castle the opportunity to file a response to the affidavit. Castle's response argues that the affidavit does not avoid dismissal and submits affidavits and evidence of its own.

II. DISCUSSION

A. Standards of Review

1. Rule 12(b)(6) Standard

In determining a Rule 12(b)(6) motion to dismiss, "the material allegations of the complaint are taken as admitted," and the Court must liberally construe the complaint in plaintiff's favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969) (citing Fed.R.Civ.P. 8(f) and *Conley v. Gibson*, 355 U.S. 41 (1957)). All reasonable inferences are drawn in favor of plaintiff. *Sturm v. Clark*, 835 F.2d 1009, 1011 (3d Cir. 1987). Further, the Court must follow "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. at 45-46; *Piecknick v. Commonwealth of Pennsylvania*, 36 F.3d 1250, 1255 (3d Cir. 1994).

2. Summary Judgment Standard

Summary judgment shall be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P.

56(c); *see also Sharpe v. West Indian Co.*, 118 F. Supp. 2d 646, 648 (D.V.I. 2000). The nonmoving party may not rest on mere allegations or denials, but must establish by specific facts that there is a genuine issue for trial from which a reasonable juror could find for the nonmovant. *See Saldana v. Kmart Corp.*, 42 V.I. 358, 360-61, 84 F. Supp. 2d 629, 631-32 (D.V.I. 1999), *aff'd in part and rev'd in part*, 260 F.3d 228 (3d Cir. 2001). Only evidence admissible at trial shall be considered and the Court must draw all reasonable inferences therefrom in favor of the nonmovant.

B. The territorial claims are preempted by federal labor law

In Count I, Fedee alleges that her dismissal was improper because it was not for any of the reasons allowed by the Virgin Islands Wrongful Discharge Act ["WDA"]. Castle is correct, however, that federal labor law preempts this claim. Fedee is covered by the collective bargaining agreement between Castle and the union. Section 301 of the LMRA preempts any claims under local law that are "inextricably intertwined with consideration of the terms of the labor contract." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213 (1985). Any decision regarding the wrongfulness of Fedee's discharge is clearly intertwined with the terms of the CBA, so section 301 preempts Count I.

In Count II, Fedee alleges that she was discharged "without just cause" and therefore in "violation of the contract employment." (Comp. ¶ 20.) It is not clear whether she is suing on the terms of the CBA or some other contract. Count III's "claim" is even more undiscernable:

> 23. Plaintiff was an employee of [Castle] entitled to due process before any interruption of wages and benefits.
> 24. The contract between Plaintiff and [Castle] was breached when Plaintiff was terminated without due process or just cause.
> 25. [Castle] breached its duty to Plaintiff by not bringing about a resolution to Plaintiff's grievance.
> 26. [Castle] has violated the terms of the union contract and wrongfully terminated Plaintiff.

(Compl. ¶¶ 23-26.) To the extent Fedee seeks recovery under territorial law in Counts II and III, I find that section 301 also preempts such claims because their determination is "inextricably intertwined" with the terms of the CBA.

C. The federal labor law claims are barred by the statute of limitations

Both parties agree that Fedee's federal claims against Castle for allegedly breaching the CBA's terms coupled with her claims against the union in Count IV constitute a "hybrid" section 301/fair representation action under federal labor law. I agree.

As a result, these federal claims are subject to the six-

month statute of limitations under *DelCostello v. Int'l Brotherhood of Teamsters*, 462 U.S. 151, 163 (1983).[2] The statute of limitations begins to run "when the futility of further union appeals became apparent or should have become apparent to . . . plaintiffs." *Scott v. Local 868, Int'l Brotherhood of Teamsters*, 725 F.2d 226, 229 (3d Cir. 1984). This statute of limitations does not require that the union expressly notify the plaintiff that it will take no further action, but instead "begins to run when plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the acts forming the alleged violation." *Harrigan v. Caneel Bay, Inc.*, 745 F. Supp. 1122, 1128-29 (D.V.I. 1990).

Fedee argues that the 12(b) motion to dismiss should be denied because the "record" is not sufficient to determine when the statute of limitations expired. Castle characterizes this as a frivolous attempt to create a factual dispute to avoid dismissal. I find that the "pleadings" are insufficient to grant 12(b)(6) dismissal. Dismissal under 12(b) motion is only proper when the statement of a claim affirmatively shows that the cause of action has not been brought within the statute of limitations.

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[2] In opposing the motion, Fedee argues that application of the six-month limitation is inequitable. In support of this proposition, Fedee cites the dissenting and concurring opinions from Supreme Court and Third Circuit Court of Appeals precedent. I am bound by *stare decisis* to apply the six-month statute of limitations. *See DelCostello*, 462 U.S. at 163.

Hanna v. United States Veterans' Administration Hospital, 514 F.2d 1092, 1094 (3d Cir. 1975); *Ott v. Midland-Ross Corp.*, 523 F.2d 1367 (6th Cir. 1975). Fedee's statement of claim does not affirmatively show when the futility of further union appeals should have become apparent, so 12(b) dismissal is not proper.

The magistrate judge, however, allowed both parties to supplement the record by filing affidavits and exhibits that further clarify the time line of events. While merely filing materials outside the complaint does not convert a 12(b)(6) motion to one for summary judgment, I will treat the motion as such and consider these affidavits and exhibits, inasmuch as both parties have been given a reasonable opportunity to present additional materials.[3]

After considering all the evidence Fedee has submitted in support of her arguments on the statute of limitations, *i.e.*, her

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[3] Rule 12(b) itself provides for such conversion:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

FED. R. CIV. P. 12(b); *see also See Garita Hotel Ltd. Partnership v. Ponce Federal Bank, F.S.B.*, 958 F.2d 15, 22 (1st Cir. 1992). "A court may consider an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss [without converting it to a motion for summary judgment] if the plaintiff's claims are based on the document." *Pension Benefit Guar. Corp. v. White Consol. Indus.*, 998 F.2d 1192, 1196 (3d Cir. 1993). As Fedee's claims are not based on Castle's letters and affidavits because she has no notice of them, this exception does not apply.

sworn affidavit, I find that she has failed to raise a genuine issue of material fact that her action is not barred by the statute of limitations. I find it undisputed that the six-month statute of limitations clearly had expired when Fedee brought this action on August 27, 2003. On May 18, 2002, the union filed the grievance on her behalf. On May 27, this was denied. On July 18, 2002, Fedee attended a mediation hearing regarding the grievance. On July 22, 2002, Castle again refused to reinstate her. Even assuming Fedee did not learn her appeal was futile at the July 18 hearing, she waited seven months before even inquiring into the status of her grievance. Only on March 20, 2003, did Fedee's retained counsel attempt to contact the union. I conclude as a matter of law that Fedee could have ascertained that further union procedures would be futile before February 2003. Accordingly, her claims against the Union and Castle are barred by the six month statute of limitations. *See Harrigan*, 745 F. Supp. at 1129 (finding federal labor claim barred because plaintiff failed to exercise reasonable diligence in failing to determine status of her grievance for eleven months).

D. Count V fails to state a claim

Count V alleges that after Del Sol's alleged assault, Castle failed to take any action against Del Sol and that Castle "condoned" Del Sol's alleged assault. (Compl. ¶¶ 34-35.)

Fedee's claim not only lacks a cognizable legal theory, it also fails to allege any damages as a result. As Fedee can prove no set of facts that would entitle her to relief on Count V, I will dismiss it.

III. CONCLUSION

For the foregoing reasons, I will dismiss all of plaintiff's claims. The claims under territorial law are preempted by section 301. Any remaining federal labor law claims are barred by the statute of limitations. Count V fails to state a claim.

ENTERED this 14th day of April, 2004.

FOR THE COURT:

_____/s/_____
Thomas K. Moore
District Judge